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Ndukwe Victor Michael v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–143–05 OF 2014
AZIAH ALI, ZAKARIA SAM AND AHMADI ASNAWI JJCA
22 MARCH 2016

C *Criminal Procedure — Appeal — Appeal against conviction and sentence — Drugs found in bag — Appellant denied bag belonged to him — Whether evidence of drug analysis admissible — Whether there was break in chain of evidence — Whether integrity of drugs exhibit compromised due to delay — Whether defence reliable — Whether defence afterthought — Whether*
D *conviction safe — Dangerous Drugs Act 1952 s 39B(1)(a)*

This instant appeal by the appellant was against the conviction and sentence for an offence of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). On 7 August 2011 when PW1 was on
E duty at the baggage claim area in the Kuala Lumpur International Airport ('KLIA'), he saw the appellant who was alone removing two bags from the carousel and placed them on a trolley. PW1 directed the appellant to put his bags into the scanning machine but nothing incriminating was seen. PW1 then directed the appellant to take his bags with the trolley to the narcotics office and
F there, PW1 conducted a body search on the appellant but still nothing incriminating was found. In the presence of the appellant, PW1 inspected the striped plastic bag and found two pieces of cloth, black and yellow/blue in colours which were heavy and lumpy. PW1 opened the cloths and found nine pockets stitched on each cloth. Inside each pocket was a plastic packet
G containing crystal substance suspected to be dangerous drugs. PW1 marked each exhibit seized. PW1 prepared a search list and both PW1 and the appellant then signed the search list. The next day, PW1 handed over the appellant and the exhibits to the investigating officer ('PW3'). PW3 had taken picture of the exhibits and put the exhibits inside a sealed box marked as 'HZ'.
H On 9 April 2012, PW3 handed over the exhibits to the chemist ('PW4'). PW4 found that the black cloth exhibit contained 807.1g of methamphetamine and the yellow/blue cloth exhibit contained 778g of methamphetamine. PW3 then handed over the exhibits to PW5 at the store for safekeeping. The exhibits and report number were recorded in the register book. PW3 conceded that she had
I sent the exhibits to the chemist eight months after she received it but she denied any mix up because the exhibits were marked by her and PWI. Further, on 8 August 2011 she had not received any other exhibit and PW1 confirmed that on 7 August 2011 he made no other drug arrests except for the appellant. At end of the prosecution case, the trial court found that the respondent had

proved prima facie case against the appellant and the appellant was ordered to enter his defence. In his defence, the appellant argued that the sling bag was his bag but denied that the plastic bag belonged to him. He stated that the name on the baggage tag was his friend's name, Chindu. He further said that he was asked by a policewoman to pick up and scanned the bag. Then, the policewoman opened the bag, took the bag to a room and a man came into the room. According to the appellant, he did not know the contents of the search list and was forced to sign it. He also contended that he had told the police at the airport about Chindu and denied that Chindu was fictitious. At the conclusion of the trial, the learned trial judge found that the respondent had proved its case beyond reasonable doubt. The appellant was convicted and sentenced to death, hence this appeal. The appellant submitted that the failure by the respondent to call the two science officers who had assisted PW4 to analyse the drugs rendered the result of the analysis inadmissible. In reply, the respondent submitted that these two officers merely assisted PW4. The appellant also argued that there had been a break in the chain of evidence in relation to the identity of the drug exhibits.

Held, dismissing the appeal; affirming conviction and sentence by the High Court:

(1) The court had perused the relevant part of the testimony of PW4 and found that the two officers merely operated the machines. The two officers will calibrate the machines which PW4 would then verify. They were not involved in the preparation of the samples or the process of analysing the samples. The samples to be analysed were prepared by PW4 in vials which PW4 had sealed herself. Any tampering of the vials would have been detected. The contention by learned counsel on this issue was without merit and could not be sustained (see paras 26–28).

(2) From the evidence, the court found that the exhibits had been properly handled and marked and all the relevant witnesses had identified the exhibits in court. The court was satisfied that the exhibits produced in court were the same exhibits seized by PW1 from the appellant (see paras 29 & 31–36).

(3) On the issue of delay, the court accepted the testimony of PW4 that no significant scientific change would have occurred to the drug exhibits over the eight months except for the colour. The evidence of a chemist on dangerous drugs analysed by him was one of fact and not of opinion. In the present case, there was no evidence called by the defence to contradict PW4 on the tests carried out or on the integrity of the drug exhibits. Thus, the court found that the integrity of the drug exhibits had not been compromised as suggested by learned counsel (see paras 37–39).

(4) The court was of the view that if the allegation by the appellant that the bag belonged to his friend was true, then any reasonable man who found himself suddenly confronted with drugs in his luggage would have protested his innocence immediately. Yet the appellant did not do so. The court also was of the view that it was improbable for a policewoman to direct a passenger to pick up a bag from the carousel for no reason. Having evaluated the defence case, the court found that the defence was an afterthought, hence the conviction was safe (see paras 40–41).

[Bahasa Malaysia summary

Dalam rayuan ini oleh perayu terhadap sabitan dan hukuman untuk kesalahan mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Pada 7 Ogos 2011 apabila PW1 bertugas di tempat tuntutan bagasi di Lapangan Terbang Antarabangsa Kuala Lumpur ('KLIA'), dia ternampak perayu yang berseorangan mengeluarkan dua beg daripada karusel dan meletakkannya ke atas troli. PW1 mengarahkan perayu untuk meletakkan begnya ke dalam mesin pengimbasan tetapi tiada apa-apa yang boleh menyabitkan dilihat. PW1 kemudiannya mengarahkan perayu untuk mengambil begnya dengan troli ke pejabat narkotik dan di sana, PW1 mengadakan carian badan ke atas perayu tetapi masih tiada apa-apa yang boleh menyabitkan ditemui. Dengan kehadiran perayu, PW1 memeriksa beg plastik berjalur dan menemui dua helai kain berwarna hitam dan kuning/biru yang berat dan berketul-ketul. PW1 membuka kain tersebut dan menemui enam poket yang dijahit pada setiap kain tersebut. Dalam setiap poket terdapat paket plastik yang mengandungi bahan kristal yang disyaki dadah berbahaya. PW1 menandakan setiap ekshibit yang dirampas. PW1 menyediakan senarai carian dan kedua-dua PW1 dan perayu kemudiannya menandatangani senarai carian. Keesokan hari, PW1 menyerahkan perayu dan ekshibit kepada pegawai penyiasat ('PW3'). PW3 telah mengambil gambar ekshibit dan meletakkan ekshibit ke dalam kotak bertutup ditandakan sebagai 'HZ'. Pada 9 April 2012, PW3 menyerahkan ekshibit kepada ahli kimia ('PW4'). PW4 mendapati bahawa kain hitam tersebut mengandungi 807.1g methamphetamine dan kain kuning/biru mengandungi 778g methamphetamine. PW3 kemudiannya menyerahkan ekshibit kepada PW5 di stor untuk simpanan. Ekshibit dan nombor laporan direkodkan dalam buku pendaftaran. PW3 mengakui bahawa dia telah menghantar ekshibit kepada ahli kimia lapan bulan selepas dia menerimanya tetapi dia menafikan apa-apa percampuran kerana ekshibit tersebut ditandakan olehnya dan PWI. Seterusnya, pada 8 Ogos 2011 dia tidak menerima sebarang ekshibit lain dan PW1 mengesahkan bahawa pada 7 Ogos 2011 dia tidak membuat apa-apa tangkapan dadah selain perayu. Pada penutup kes pendakwaan, mahkamah perbicaraan mendapati bahawa responden telah membuktikan kes prima facie terhadap perayu dan perayu diarahkan untuk memasukkan pembelaannya. Dalam pembelaannya, perayu menghujah bahawa beg sandang adalah begnya tetapi menafikan beg plastik tersebut adalah kepunyaannya. Dia menyatakan nama pada tag adalah nama

kawannya, Chindu. Dia seterusnya berkata bahawa dia ditanya oleh polis wanita untuk mengangkat dan mengimbas beg tersebut. Kemudian, polis wanita tersebut membuka beg, membawa beg tersebut ke sebuah bilik dan seorang lelaki masuk ke dalam bilik tersebut. Menurut perayu, dia tidak tahu kandungan senarai carian dan dipaksa untuk menandatanganinya. Dia juga menegaskan bahawa dia memberitahu polis di lapangan terbang mengenai Chindu dan menafikan bahawa Chindu adalah rekaan. Pada penutup perbicaraan, hakim bicara yang bijaksana mendapati bahawa responden telah membuktikan kesnya melangkaui keraguan munasabah. Perayu disabitkan dan dijatuhi hukuman mati, oleh itu rayuan ini dibuat. Perayu menghujah bahawa kegagalan oleh responden untuk memanggil dua pegawai sains yang telah membantu PW4 untuk menganalisa dadah menjadikan hasil analisis tersebut tidak boleh diterima. Sebagai balasan, responden menghujah bahawa kedua-dua pegawai ini hanya membantu PW4. Perayu juga menghujah bahawa rantaian keterangan terputus berhubung identiti ekshibit dadah.

Diputuskan, menolak rayuan; mengesahkan sabitan dan hukuman oleh Mahkamah Tinggi:

(1) Mahkamah telah meneliti bahagian yang berkaitan keterangan PW4 dan mendapati bahawa kedua-dua pegawai tersebut hanya mengendalikan mesin. Kedua-dua pegawai akan mengubah suai mesin yang PW4 kemudian akan sahkan. Mereka tidak terlibat dalam penyediaan sampel atau proses menganalisis sampel. Sampel untuk dianalisis telah disediakan oleh PW4 dalam cawan-cawan di mana PW4 dengan sendirinya akan menutupnya. Sebarang gangguan ke atas cawan-cawan tersebut akan dapat dikesan. Hujahan oleh peguam yang bijaksana mengenai isu ini adalah tanpa merit dan tidak dapat dikekalkan (lihat perenggan 26–28).

(2) Daripada keterangan, mahkamah mendapati bahawa ekshibit-ekshibit telah dikendalikan dengan betul dan ditanda dan semua saksi berkenaan telah mengenal pasti ekshibit-ekshibit di mahkamah. Mahkamah berpuas hati bahawa ekshibit yang dikemukakan ke mahkamah adalah ekshibit yang sama dirampas oleh PW1 daripada perayu (lihat perenggan 29 & 31–36).

(3) Mengenai isu kelewatan, mahkamah menerima keterangan PW4 bahawa tiada perubahan saintifik yang ketara akan berlaku kepada ekshibit kes dadah dalam tempoh lapan bulan kecuali untuk warna. Keterangan ahli kimia ke atas dadah berbahaya yang dianalisis oleh dia merupakan satu fakta dan bukannya pendapat. Dalam kes ini, tiada bukti yang dipanggil oleh pihak pembelaan untuk menyangkal PW4 atas ujian yang dijalankan atau ke atas integriti ekshibit dadah. Oleh itu, mahkamah mendapati bahawa integriti ekshibit dadah tidak terjejas seperti yang dicadangkan oleh peguam yang bijaksana (lihat perenggan 37–39).

(4) Mahkamah berpendapat bahawa jika dakwaan perayu bahawa beg tersebut milik kawannya adalah benar, maka mereka yang berfikiran waras yang mendapati dirinya tiba-tiba berhadapan dengan dadah dalam bagasinya akan membantah dia tidak bersalah dengan segera. Namun perayu tidak berbuat demikian. Mahkamah juga berpendapat bahawa adalah mustahil untuk polis wanita untuk mengarahkan seorang penumpang untuk mengambil beg dari karusel tanpa sebab. Setelah menilai kes pembelaan, mahkamah mendapati bahawa pembelaan adalah satu pemikiran selepas, oleh itu sabitan tersebut adalah selamat (lihat perenggan 40–41).]

Notes

For cases on appeal against conviction and sentence , see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 301–419.

Cases referred to

Ahmad Najib bin Aris v PP [2009] 2 MLJ 613; [2009] 2 CLJ 800, FC (refd)
Chu Tak Fai v PP [2007] 1 MLJ 201; [2006] 4 CLJ 931, FC (refd)
Mohamad bin Deraman v PP [2011] 3 MLJ 289; [2011] 3 CLJ 601, CA (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705; [2000] 4 CLJ 649, HC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d), 39B(1)(a), (2), First Schedule

Appeal from: Criminal Trial No 45A-134–07 of 2012 (High Court, Shah Alam)

Stanley Augustin (Stanley Augustin & Co) for the appellant.
Intan Nor Hilwani bt Mat Rifin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Aziah Ali JCA:

INTRODUCTION

[1] The appellant was charged before the High Court at Shah Alam with an offence of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') as follows:

> Bahawa kamu pada 7 Ogos 2011 jam lebih kurang 11 malam, di laluan keluar ke Kaunter Pemeriksaan Kastam, Aras 3, MTB KLIA, di dalam Daerah Sepang di dalam Negeri Selangor Darul Ehsan, telah memperedarkan dadah berbahaya iaitu Methamphetamine sejumlah berat 1585.1 gram dan oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah s 39B(2) Akta yang sama.

[2] At the conclusion of the trial, the learned judge found that the prosecution has proved its case beyond reasonable doubt. The appellant was convicted and sentenced to death, hence this appeal. Having considered the submissions made by learned counsel and the learned deputy public prosecutor ('DPP') we found no merit in this appeal. We therefore dismissed the appeal and affirmed the conviction and sentence imposed by the High Court. We now set out our reasons below.

[3] At the outset it must be mentioned that the trial judge had left service and we had heard this appeal without the benefit of the written grounds of judgment. Notwithstanding the absence of the written grounds of judgment, we proceeded to hear this appeal since an appeal is a continuation of proceedings by way of rehearing and an appeal court may subject the evidence to a critical re-examination (*Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800; *Mohamad bin Deraman v Public Prosecutor* [2011] 3 MLJ 289; [2011] 3 CLJ 601).

CASE FOR THE PROSECUTION

[4] On 7 August 2011 at about 8pm, Sgt Zulkefli bin Hj Zainal ('PW1') together with six other colleagues were on duty at the baggage claim area in the International Arrival Hall, Level 3 of the Kuala Lumpur International Airpot ('KLIA'). PW1 was at carousel G when he saw the appellant removing two bags from the carousel and placed them on a trolley. The appellant was alone. The appellant appeared to be looking for the exit pushing the trolley. PW1 directed the appellant to put his bags into the scanning machine. One was a black sling bag ('exh P4') and the other was a plastic bag with blue and red stripes ('exh P5'). Nothing incriminating was seen. PW1 then directed the appellant to take his bags with the trolley to the narcotics office which was also on Level 3. There PW1 conducted a body search on the appellant. Nothing incriminating was found.

[5] In the presence of the appellant, PW1 then inspected the black sling bag. Nothing incriminating was found. PW1 then turned his attention to the striped plastic bag. Attached to this bag were two baggage tags ('exh P6 & P7'). Inside this bag, PW1 found a pair of sports shoes and some clothing ('exh P5(A)–5(L)'). Within the clothes, PW1 found two pieces of cloth (*kain ela)*, one was black in colour ('exh P31(A)') and the other was yellow/blue ('exh P31(D)'). PW1 found that the pieces of cloth were heavy and lumpy (*berat dan berbonggol-bonggol)*.

[6] PW1 opened up the black coloured cloth and found nine pockets stitched into the material. PW1 unpicked part of the stitching of each pocket and saw that each pocket was lined with blue carbon paper. Inside each pocket was a plastic packet containing crystal substance suspected to be dangerous drugs. The same discovery was made in respect of the other yellow/blue coloured cloth. In total PW1 recovered 18 plastic packets of crystal substance.

[7] PW1 weighed each plastic packet. The total weight of the nine plastic packets found inside the black coloured cloth was 1080g. The total weight of the nine plastic packets recovered from yellow/blue cloth was 1060g.

[8] PW1 had also recovered, amongst others, the appellant's passport ('exh P9'), a student pass ('exh P10'), a departure card ('exh P11'), two boarding passes from Lagos to Dubai to Kuala Lumpur ('exh P13 & P14') and an e-ticket with the words 'EK342' for Dubai to Kuala Lumpur ('exh P15'). All these exhibits bore the appellant's name. PW1 marked each exhibit seized by writing the date and signing his name on each exhibit with a black marker pen. PW1 also wrote 'ZZ(C)' on the black sling bag, 'ZZ' on the red/blue plastic bag, 'ZZ(A)' on the black coloured material and 'ZZ(A1)'–'ZZ(A9)' on the nine pockets, 'ZZ(B)' on the blue coloured material and 'ZZ(B1)'–'ZZ(B9)' on the pockets.

[9] PW1 prepared a search list ('exh P8') which was explained to the appellant in English by Sgt Abdul Rahman bin Hj Yassin ('PW2') who was present and witnessed the inspection process and the recovery of the drugs. Both PW1 and the appellant signed the search list. PW1 also lodged a police report KLIA Sepang 8341/11 ('exh P22'). He also prepared a *Borang Serah Dan Terima Barang Kes* ('exh P23'). On 8 August 2011 at about 1.30am, PW1 handed over the appellant together with the exhibits seized to the investigating officer ('IO') Insp Haryati bt Zahruddin ('PW3') at the narcotics office, Sepang Police Headquarters. Both PW1 and PW3 signed exh P23.

[10] PW3 marked 'HZ' and signed on the exhibits she had received from PW1 using a red marker pen. PW3 had also taken photographs of the exhibits ('exh P21(1–35)'). She kept the 18 packets of drug exhibits and the two pieces of cloth inside a box on which she wrote 'HZ' ('exh P31'), the report number and the number of the investigation paper ('IP'). The box was sealed with the 'CAD Sepang' seal. PW3 then placed the box inside a locked steel cabinet in her room. Only she had access to the room and the steel cabinet.

[11] On 9 April 2012 PW3 took the box containing the exhibits to the chemistry department and handed the box and its contents to the chemist, Dr Vanitha Kunalan ('PW4') for analysis ('exh P25'). PW4 acknowledged receipt ('exh P26'). PW4 wrote the laboratory case number on each plastic packet.

[12] PW4 weighed the black coloured cloth and the gross weight was 1057.68g. The gross weight of the yellow/blue cloth was 1033.10g. PW4 agreed with learned counsel that the weight obtained differed from the weight as stated in the POL 31 in which it was stated that the weight of the black coloured cloth was 1080g and the yellow/blue cloth was 1060g.

[13] The analysis carried out by PW4 showed that the net weight of the crystal substance recovered from the black coloured cloth was 1046.9g and it contained 807.1g of methamphetamine. The net weight of the crystal substance recovered from the yellow/blue cloth was 1023.7g and it contained 778g of methamphetamine. Methamphetamine is listed in the First Schedule to the Act. PW4 prepared a report ('exh P27'). On 25 July 2012 PW4 handed over the exhibits and the chemist report to PW3.

[14] On 18 April 2012, PW3 handed over the black bag and the red/blue striped plastic bag to Cpl Ramasenteram a/l Manaf ('PW5') at the exhibit store for safekeeping. The exhibits were recorded in the register book under entry number 112. Also recorded is the report number ('exh P29'). PW5 also wrote 'D112/12' on the bag and on the baggage tags exhs P5, P6 and P7. On 27 July 2012 PW3 handed over the box containing the drug exhibits to one Cpl Razif Ismail at the store. The box was registered as 'D239/12'. Similarly, the report number was also recorded in the register book ('exh P28').

[15] PW3 conceded that she had sent the exhibits to the chemist department approximately eight months after she had received them from PW1. But PW3 denied that there was a possibility of any mix-up of the drug exhibits while they were in her custody because the exhibits were marked by her and PW1. Further on 8 August 2011 she had not received any other exhibit. This was confirmed by PW1 who had stated that on 7 August 2011 he made no other drug arrests except for the appellant.

FINDING AT THE END OF THE PROSECUTION CASE

[16] The notes of evidence show that at the end of the prosecution case, the trial judge found that the prosecution has proved a prima facie case against the appellant. He was ordered to enter his defence.

[17] We agree with the finding by the trial judge. We find that the prosecution has proved that the appellant had brought the two bags with him from Lagos to Kuala Lumpur. He had collected the bags from the carousel, placed them onto the trolley and was seen pushing the trolley towards the exit. There is thus ample evidence to show that the appellant had custody and control and possession of these two bags and the drugs found in the bags. Therefore the presumption of knowledge under s 37(d) of the Act can be

invoked against him. The prosecution has also shown that the appellant had transported the drugs from Lagos to Kuala Lumpur. This act clearly falls within the definition of 'trafficking' under s 2 of the Act.

DEFENCE CASE

[18] According to the appellant, he had come to Malaysia on 18 January 2011 to study English at one 'Shakespeare College'. His father had passed away on 4 August 2010. He had known a fellow Nigerian by the name of Chindu Micheal for about five months. Chindu is also a student in Malaysia. He does not know where Chindu stays in Malaysia. When the appellant wanted to return to Nigeria to attend a prayer ceremony on his late father's death anniversary, Chindu decided to follow him back to Nigeria to attend the ceremony. The appellant said that he had fallen sick, so Chindu bought their flight tickets back to Nigeria but the appellant said that he had paid for his own ticket. However he does not know that it was a return ticket because it was bought by Chindu. He had returned from Lagos to Malaysia together with Chindu.

[19] The appellant agreed that he had taken flight EK342 from Dubai to Kuala Lumpur. According to the appellant, the sling bag ('exh P4') was his bag. He denied that the bag ('exh P5') belonged to him. He said that the name on the baggage tag ('exh P6') is Chindu's name, not his.

[20] According to the appellant, on arrival at the airport he was waiting for Chindu to come and collect the bag. He was alone. He did not know where Chindu was. When the bag arrived on the conveyor belt, he was close to the bag but he did not take the bag. A policewoman had asked him to scan the bag. He had told this policewoman that it was not his bag and that he was waiting for the owner, Chindu. But the policewoman said that it was not a problem and to just put the bag in the scanning machine. Then the policewoman opened the bag and she called a man. The policewoman took the bag to a room and a man came into the room.

[21] The appellant said that although he had signed the search list, he did not know the contents of the search list because it was not translated to him. He was forced to sign the search list because the police had beaten him till he was bleeding from his ear. The police had also threatened to cut his private part if he did not do as told. The appellant said that he had told the police at the airport and the IO about Chindu. He could not contact Chindu because the police had taken away his handphone. The appellant denied that Chindu is fictitious. It is the appelant's defence that the bag exh P5 does not belong to him but to Chindu and he does not know the contents of the bag.

FINDING AT THE END OF DEFENCE CASE

[22] At the end of the defence case, in a short judgment, the trial judge found that the prosecution has proved its case beyond reasonable doubt. The appellant was accordingly sentenced to death.

THE APPEAL

[23] Learned counsel for the appellant raised two grounds of appeal which can be summarised as follows:

(a) that the failure by the prosecution to call the two science officers who had assisted PW4 to analyse the drugs renders the result of the analysis inadmissible; and

(b) that there had been a break in the chain of evidence in relation to the identity of the drug exhibits.

[24] The first issue relates to the testimony of the chemist, PW4 who had testified that the GCMS machine was operated by one science officer by the name of Jeremiah Chuah and the CGFID machine was operated by one Chee Bok Choi. The GCMS analysis is to determine the presence of methamphetamine and the GCFID analysis is to determine the quantity.

[25] It was submitted by learned counsel that the failure of the prosecution to call the two officers to testify renders the analysis flawed and the GCMS and the GCFID results cannot be accepted. The learned DPP submitted in reply that these two officers merely assisted PW4. The samples to be analysed for both the GCMS and GCFID tests were prepared by PW4 herself.

[26] We have perused the relevant part of the testimony of PW4 and we find that the two officers merely operated the machines. The two officers will calibrate the machines which PW4 would then verify. They were not involved in the preparation of the samples or the process of analysing the samples. PW4 explained the scope of duties of the two officers as follows (p 134 appeal record):

S: Berhubung tugas En Jeremiah dan Pn Chee, boleh jelaskan?

J: Tugas penolong pegawai sains adalah untuk mengoperasikan peralatan GCMS dan GCFID dari segi pengoperasian software sahaja di mana kalibrasi akan dilakukan dan penyelenggaraan berkala juga akan di lakukan.

[27] The samples to be analysed were prepared by PW4 in vials which PW4 had sealed herself. Any tampering of the vials would have been detected. The samples for analysis will be placed in a tray and there will be other samples for analysis as well in the tray. Each vial will be marked with a specific laboratory number. In this particular case the number is PJ(FOR)5385/12–0. The vials will be arranged in sequence according to the particular chemist who prepared the samples. The sequence of the vials will be printed in the report. In this case, PW4 herself arranged the vials on the tray. The vials will be left in the machines overnight and the next day, the chemist will check. In this case, PW4 did check the vials the following day to ensure no mistake or error had occurred. The vials together with the analysis result printed out by the two officers will then be handed over to the chemist. In cross-examination, PW4 explained that if there is any technical problem with the machines, no analysis will be carried out.

[28] Having considered the evidence, we find that the two officers had no role to play in the preparation of the samples or the analysis of the samples. The contention by learned counsel on this issue is without merit and cannot be sustained.

[29] On the issue of whether there had been a break in the chain of evidence so as to raise a doubt on the identity of the exhibits, learned counsel raised the possibility of the exhibits being mixed up with exhibits from other cases during the period when the exhibits were in the custody of the IO because the IO had agreed that there were other exhibits in the steel cabinet. It was submitted that the IO had not made any specific markings on the exhibit. Rather, she had marked 'HZ' on all the exhibits for the cases that she was investigating. It was contended that the IO could not differentiate the exhibits in her possession because the exhibits all bore the same markings. An issue was also raised with regard to the delay by the IO in sending the exhibits to the chemist for analysis. Learned counsel submitted that the delay would have compromised the exhibits. In reply, the learned DPP submitted that the evidence of PW1, PW3 and PW4 show that there was no mix-up of the exhibits. PW4 had also testified that the delay in sending the drug exhibits for analysis had not compromised the integrity of the exhibits.

[30] In considering this issue, we perused the evidence regarding the handling of the exhibits from the time PW1 seized them till the exhibits were sent to the chemist for analysis and then sent to the exhibit store for safekeeping.

[31] PW1 had testified that he had marked the black material as 'ZZ(A)', wrote the date and signed. PW1 marked the nine plastic packets of drugs as 'ZZ(A1)' to 'ZZ(A9)'. Similarly, PW1 marked the other yellow/blue material as 'ZZ(B)', wrote the date and signed. He marked the nine plastic packets as 'ZZ(B1)' to 'ZZ(B9)'. After he had prepared the search list and lodged the police report KLIA Sepang/008341/11, PW1 handed over the exhibits, the search list, the police report and the appellant to PW3, the IO.

[32] PW3 had confirmed that the appellant together with the exhibits had been handed over to her on 8 August 2011 at about 8am. Both she and PW1 had signed the *Borang Serah Dan Terima Barang Kes*. PW3 had identified the markings made by PW1 on the exhibits. On her part, PW3 marked the exhibits with the alphabets 'HZ'. At about 12.30pm the same day, PW3 herself had taken 35 photographs of the exhibits ('exh P21(1–35)'). All the exhibits were placed in a box on which PW3 had also written 'HZ'.

[33] PW3 had agreed with learned counsel that there were other exhibits for other cases under her investigation that were also kept in her steel cabinet, but she denied any possibility of a mix-up of the exhibits. We take the liberty to reproduce the relevant extracts of her testimony as follows (pp 154–155 appeal record):

> J: Saya tidak setuju barang kes dadah yang saya terima mudah dikacau ganggu kerana yang pertama, yang boleh akses pejabat saya dan locker berkunci yang terdapat dalam pejabat saya hanya saya seorang. Yang kedua di dalam locker tersebut saya telah asingkan barang-barang kes seperti yang saya nyatakan sebelum ke dalam kotak yang ditandakan dengan tandaan HZ, nombor repot KLIA Sepang 8341/11, dan barang-barang kes di dalam kotak tersebut terdapat tandaan-tandaan dari pengadu iaitu tandatangan serta tarikh waktu OKT ditahan dan barang kes yang saya asingkan tersebut adalah seperti mana yang saya terima dari senarai bongkar dan senarai serah terima barang-barang kes.
>
> S: Kamu ditanya dengan tandaan HZ yang mana kamu membuat tandaan HZ sama dengan kes-kes kamu yang lain, bagaimana kamu membuat perbezaan tersebut?
>
> J: Walaupun saya telah membuat tandaan HZ pada setiap barang kes yang saya terima tetapi terdapat juga tandaan dari pihak pengadu iaitu khususnya kepada tarikh tangkapan dibuat dan juga repot.
>
> S: Semasa kamu menerima barang kes adakah tandaan pengadu telah sedia ada pada barang kes.
>
> J: Benar telah sedia ada.

[34] The date of arrest is significant because in his testimony, PW1 had stated that he had made only one drug related arrest on 7 August 2011 and PW3 had confirmed that on 8 August 2011, these exhibits were the only

exhibits that she had received from PW1. On the issue of delay, PW3 explained that the delay in sending the exhibits to the chemistry department was an oversight on her part.

[35] The chemist, PW4 confirmed that PW3 had handed to her a box marked 'HZ' and sealed with the police seal. She had also received the form Pol 31 ('exh P25'). PW4 issued to PW3 an acknowledgment receipt in which she had written the laboratory No PJ(FOR)5385/12–0. In court PW4 had identified the box by the laboratory number, the seal of the chemistry department and the police report number.

[36] We find that the exhibits had been properly handled and marked. All the relevant witnesses had identified the exhibits in court. We are satisfied that the exhibits produced in court are the same exhibits seized by PW1 from the appellant.

[37] On the issue of delay, we have no reason to doubt the testimony of PW4 who had testified that no significant scientific change would have occurred to the drug exhibits over the eight months except for the colour, which again is dependent on the foreign material present in the drugs. This is what PW4 had stated:

> S: Untuk barang kes ini, adakah ianya akan mengalami perubahan saintifik jika disimpan dalam tempoh masa yang lama iaitu selama 8 bulan sebelum diserahkan kepada Jab Kimia?
>
> J: Untuk tempoh tersebut, tiada perubahan significant yang akan berlaku pada barang kes. Kandungan dan texture bahan tersebut tidak akan berubah.
>
> S: Warna?
>
> J: Warna bergantung kepada bahan atau benda asing yang terdapat dalam barang kes tersebut.

[38] The evidence of a chemist on dangerous drugs analysed by him is one of fact and not of opinion. In *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649, the late Augustine Paul J (as he then was) said:

> ... the evidence of a chemist on the analysis of drugs by him is not evidence of opinion but evidence of fact, he need not give particulars of the tests carried out by him in his evidence. The report tendered therefore need not contain such particulars ... if an accused is dissatisfied with the conclusion reached by the chemist, it is for him to summon the chemist as a witness for that purpose or adduce evidence in rebuttal ...

In *Chu Tak Fai v Public Prosecutor* [2007] 1 MLJ 201; [2006] 4 CLJ 931 the Federal Court had occasion to deal with the issue of sufficiency of the evidence of the chemist as follows:

[20] On the sufficiency of the evidence of the chemist, we wish to reiterate that the court is entitled to accept the evidence of the chemist on its face value without the necessity for him to go into details of what he did in the laboratory step by step unless the evidence is so inherently incredible that no reasonable person can believe it to be true or the defence calls evidence in rebuttal by another expert (see *Balachandran*; *Munusamy v Public Prosecutor* [1987] 1 MLJ 492; [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; *Public Prosecutor v Lam San* [1991] 3 CLJ 2410; [1991] 1 CLJ (Rep) 391; *Khoo Hi Chiang v Public Prosecutor* [1994] 1 MLJ 265; [1994] 2 CLJ 151).

[39] In the present case, there is no evidence called by the defence to contradict PW4 on the tests carried out or on the integrity of the drug exhibits. We therefore find that the integrity of the drug exhibits had not been compromised as suggested by learned counsel.

[40] The defence had sought to show that the bag and the drugs belonged to Chindu. But PW1 and PW2 had stated that the appellant had not told them that the bags belonged to Chindu. We are of the view that if what the appellant had alleged is true, then any reasonable man who found himself suddenly confronted with drugs in his luggage would have protested his innocence immediately. Yet the appellant did not do so. On the issue of Chindu, PW3 had explained that she did not carry out any investigation regarding Chindu because there was insufficient information for her to investigate. The defence had also alleged that the appellant had picked up the bag from the carousel upon being told to do so by one policewoman. We find that this was never raised to either PW1 or to PW2 who were present at the material time. In any event, we are of the view that it was improbable for a policewoman to direct a passenger to pick up a bag from the carousel for no reason. We also find the allegations made by the appellant that he was assaulted by the police unsubstantiated.

CONCLUSION

[41] Having evaluated the defence case, we find that the defence is an afterthought. The defence had failed to rebut the presumption under s 37(d) of the Act on a balance of probabilities and had also failed to raise a reasonable doubt in the prosecution case. We find that the conviction is safe. For the reasons stated, we dismissed the appeal and affirmed the conviction and sentence.

Appeal dismissed; conviction and sentence by the High Court affirmed.

Reported by Dzulqarnain Ab Fatar